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Joint Criminal Enterprise and the Khmer Rouge Prosecutions

By John Ciorciari

On December 5, pre-trial judges at the Extraordinary Chambers in the Courts of Cambodia (ECCC) will rule on an appeal by the Canadian and Cambodian Co-Prosecutors in the case against Duch, who once headed the infamous Tuol Sleng Prison in Phnom Penh. The appeal deals with a number of issues, but one of the most important is the prosecution's request to apply a controversial legal doctrine known as joint criminal enterprise. As this brief article will discuss, the judges' decision on whether to grant that request will likely affect the trials of many or all Khmer Rouge defendants.

It could also set an important precedent for future international and hybrid criminal proceedings.

What is JCE?

Joint criminal enterprise, often abbreviated "JCE," is a legal doctrine that a court can use to convict a defendant of certain crimes committed by others in furtherance of a common plan or purpose. According to most legal scholars, there are three basic types of JCE. First, defendants can be found guilty if they intentionally act as part of a group carrying out a common criminal plan or design. This type of JCE is the least controversial. It builds on the notion-long recognized in most domestic legal systems-that accomplices or co-conspirators can be held responsible for crimes even when they did not pull the trigger. Although the Nuremberg Court did not use the term "joint criminal enterprise," it was the first international tribunal to invoke a similar theory, using the concept of conspiracy as grounds for convicting some Nazi officials.

Under the second form of JCE, defendants can be found guilty for crimes committed at a penal institution-like a prison or concentration camp-if they helped maintain the facility by performing essential functions. Defendants need not inflict torture, commit murder, or perpetrate other crimes to be held guilty if they played a critical role in running an institution that did.

The third form of JCE is the most expansive and most controversial. It allows a court to find a defendant guilty for crimes that were not part

of a common plan or design but were "natural and foreseeable" consequences of the plan. Thus, a defendant can be convicted even for crimes that he or she did not commit, did not intend, and did not aid or abet. The theory behind this expansive form of JCE is that defendants should assume the risk that entering into dangerous criminal plans can have unintended adverse consequences.

Why Does JCE Matter?

JCE matters largely because it would expand the universe of acts by Khmer Rouge defendants that could constitute crimes. Consequently, it would raise the likelihood of convictions. The law governing the ECCC says nothing about JCE but does provide a number of ways in which defendants can be held liable. As one would expect, it gives the court the right to try defendants for crimes that they committed personally. It also allows the court to try defendants for crimes in which they didn't pull the trigger or inflict abuse directly. Khmer Rouge defendants can be held liable if they planned, instigated, or aided and abetted crimes. Further, they can be convicted if they occupied positions of authority and either ordered abuses or failed to prevent crimes by their subordinates.

The first form of JCE probably does not add much to the prosecution's arsenal, because the court can already find defendants liable for planning or aiding and abetting crimes. The second form of JCE could have a somewhat more meaningful impact on the course of the trials. It would allow the court to hold defendants liable for certain activities at prisons like Tuol Sleng that were not criminal but helped those bone-crushing facilities function. The prosecutors probably do not need that authority to build their case against Duch. Since Duch ran the facility, prosecutors can accuse him of ordering abuses, planning them, or failing to prohibit or punish the acts of his subordinates. The relevance of this second form of JCE will depend largely on whether other defendants are accused of performing critical functions in the Khmer Rouge penal system.

The third, "extended" form of JCE is the most important for the Khmer Rouge trials. It potentially opens the door to a wide range of prosecutions based on the notion that Khmer Rouge leaders planned certain broad policies at a high level and should be held liable for their bloody consequences. Prosecutors at the International Criminal Tribunal for the former Yugoslavia (ICTY) used this variant of the principle in an effort to hold Slobodon Milosevic and other Serbian leaders responsible for crimes committed by military units that were

not directly under their commands. In cases against Khmer Rouge defendants, this "JCE-3" form of liability would reduce the prosecution's need for smoking-gun evidence, neatly documented chains of command, and clear indications of the specific criminal intent of particular defendants.

Given the time that has passed since the end of the Pol Pot era and the limited nature of surviving documentation, JCE could play a vital part in a prosecution strategy. When the Co-Prosecutors submitted their recent appeal to the Pre-Trial Chamber, they were doubtlessly thinking as much about other defendants as they were about Duch. The former Tuol Sleng chief is relatively closely tied to myriad well-documented crimes; known evidence against the other defendants varies in strength.

Why Is JCE Controversial?

Debates surrounding JCE revolve on two major axes. The first is the question of whether the principle is fair to defendants. Almost all legal systems require two basic elements to convict an individual of a crime: a prohibited act and some form of criminal intent. Under JCE-3, a defendant can be convicted of crimes that the court believes were "natural and foreseeable" consequences of a plan. Critics of JCE believe the doctrine effectively eviscerates the requirement of criminal intent and leaves jurists too much discretion to fudge the issue when the conviction of a despised defendant hangs in the balance. JCE-2 raises similar questions. In a prison where torture is commonplace, is it fair to hold the electrician liable for the same offenses as the whip-wielding interrogators down the hall? IN a recent brief to the ECCC, human rights scholar and lawyer Kai Ambos argued that JCE-2 needs to be applied narrowly to avoid catching relatively innocent functionaries in an overly broad net of criminal culpability.

Few international lawyers would deny the challenges of applying JCE fairly, but many nonetheless support the doctrine. Advocates of JCE argue that this principle appropriately holds leaders accountable for the plans they set in motion and incentivizes them to behave responsibly. Proponents of the principle also acknowledge another reason for the doctrine-without it, convicting top dogs can be difficult. JCE developed largely as a way to satisfy powerful moral and political interests in holding venal leaders responsible for their misdeeds, which are often obscured by the scale and complexity of abuses. The pre-trial judges at the ECCC will have to weigh these competing interests

in determining whether to allow JCE, particularly in its most expansive "third form."

ECCC judges will also need to resolve a second difficult legal issue. One of the most basic tenets of criminal law is that a defendant cannot be convicted of a crime that did not exist when the defendant undertook the act in question. This raises the question of whether the various forms of JCE existed by 1975. Clearly, the term had not been used by 1975. Was the principle nonetheless part of customary international law?

Scholars have taken different views. In a recent brief to the ECCC, former ICTY jurist Antonio Cassese answered in the affirmative. He argued that all three forms of JCE had become customary international law by 1975 based on precedents set at Nuremberg and in other international trials. However, Cassese was one of the key figures responsible for the development of JCE in the Yugoslav trials, leading some analysts to question his impartiality. Defense lawyers for Ieng Sary even tried (unsuccessfully) to exclude his brief for bias. Lawyer Silke Studinsky, who represents civil parties at the ECCC, responded to Cassese and argued that JCE-3 was not a part of customary international law in the 1970s. Other scholars have split on the issue. Again, there are credible arguments on both sides.

How Will the Court Decide?

The ECCC pre-trial judges face an important legal decision, and the likely outcome is not at all obvious. They could agree to admit all forms of JCE or permit the prosecution to invoke some forms of JCE but not others. If the judges accept at least some forms of JCE, they will need to determine the scope of the principle. They could also reject the doctrine altogether, arguing that it does not appear in the law governing the ECCC and was not a settled principle of customary law as of 1975.

Historically, international and hybrid criminal tribunals have not been shy about pushing the envelope and creating new theories of criminal responsibility. When the Nuremberg Court convicted Nazis of conspiracy, some scholars argued that it violated their rights; critics contended that no such crime had existed in international law during the Second World War. The ICTY faced similar attacks when it used an expansive form of JCE to prosecute Milosevic and his henchmen.

Judicial activism in international criminal forums can be a good thing. If the Nuremberg Court and ICTY had not been as progressive in their interpretation of the law, they would not have set valuable precedents that have helped international criminal law emerge from its infancy. They also would not have been able to bring some vile perpetrators to book. However, if judges are seen as creating the law, they feed perceptions that international or hybrid tribunals are more about achieving a desired outcome than holding fair trials. Justice is not all about retribution. It also means holding fair trials, and applying the law fairly sometimes requires gritting one's teeth and allowing heinous defendants to benefit from the very protections they denied to others.

The ECCC judges have to steer carefully to manage these competing objectives. The path of least political resistance is probably to allow two-and possibly all three-forms of JCE in the interest of convicting Khmer Rouge officials and advancing a progressive vision for international criminal law. However, from a strict legal standpoint, the issue is much less clear. Permitting JCE, and especially JCE-3, would elicit praise from prosecutors but would also generate significant debate within the halls of the ECCC and among outside observers.

If the judges do approve all forms of JCE, they need to provide a clear and compelling legal justification to address the legitimate critiques summarized above. If they reject the prosecution's plea, the judges will send a powerful signal that the ECCC is following a somewhat more conservative judicial approach than some of its predecessors. Again, clear legal justifications will be needed. Measures that are perceived as benefitting the Khmer Rouge defendants are not necessarily wrong, but they will not be popular. Regardless of how the ECCC judges decide, the court would be well advised to emphasize that justice requires pursuing both accountability and fairness.

Dr John Ciorciari is a senior legal advisor to DC-Cam.